

ATVA Proposed Questions for Retransmission Consent Reform NPRM

1. The retransmission consent provisions of the 1992 Cable Act were enacted as part of a regulatory scheme intended to protect the “universal availability” of local broadcasting against the threat posed by the migration of viewers, advertising and programming to cable systems and non-broadcast programming networks. Since 1992, several changes have occurred in the video programming marketplace, including the significant growth in competition among MVPDs, the consolidation of national broadcast networks with non-broadcast programming, and the increased concentration of ownership of local stations. How have these changes affected the behavior of broadcasters in carriage negotiations? How have these developments affected consumers? Do the Commission’s rules continue to ensure that retransmission consent is serving its intended purposes? Does the array of special regulatory protections afforded to broadcasters — including mandatory carriage and exclusivity protections — unfairly tilt the playing field in broadcasters’ favor and warrant new protections to prevent abuses of the retransmission consent rules?
2. The Commission concluded in the News/Hughes proceeding that broadcasters possess significant market power in the DMAs in which they have the ability to negotiate retransmission consent agreements. Does this conclusion remain valid? Are changes in the MVPD marketplace making broadcaster threats to withhold their signals from MVPDs more commonplace as a tactic in retransmission consent negotiations? Are broadcasters more or less likely to carry out such threats in today’s environment? Is the ability of broadcasters to withhold programming and/or threaten a blackout undermining the intent of Congress in creating the retransmission consent regime? Are broadcaster threats to “go dark” consistent with stations’ public interest obligations?
3. Threats to pull broadcast programming from an MVPD’s platform and actual blackouts may cause a variety of harms to consumers, which could include, among other harms: (a) the loss of popular programming; (b) higher fees (for MVPDs and their subscribers); (c) confusion and uncertainty when broadcasters threaten to pull their signals; (d) the significant cost of switching to another less-preferred MVPD or foregoing MVPD services altogether; and (e) the cost (and sometimes impossibility) of obtaining withdrawn broadcast signals over the air. How significant are these costs to consumers? Are consumers harmed when a broadcaster threatens to pull its signal but does not actually follow through on such a threat? How should the Commission measure and or address such consumer harms?
4. What steps should the Commission take to prevent or eliminate consumer harms associated with retransmission consent disputes? Have notices by cable operators of possible broadcast service disruptions resulted in consumer confusion? Have the requirement to provide such notices been used strategically by broadcasters in order to gain an advantage in retransmission consent negotiations?
5. What effect, if any, does the timing of the expiration of a retransmission consent agreement have on a broadcaster’s threat to go dark on a particular MVPD’s system? Are such threats more or less likely to be made if the existing carriage agreement is set to expire just before a major television event, such as an NFL playoff game or the Academy Awards? Would

consumers be better served by structural changes in the Commission's rules that would prevent the parties to a retransmission consent negotiation from denying consumers access to broadcast stations in advance of broadcast of marquee events? Cable operators are prohibited from deleting broadcast signals during "a period in which major television rating services measure the size of audiences of local television stations," which the Commission now defines as the quarterly "sweeps." Should broadcasters similarly be restricted from withholding their signals when *they* have the most leverage, such as immediately prior to major events?

6. What role, if any, did Congress intend for the national broadcast networks to play with respect to stations' exercise of retransmission consent rights? What effect, if any, does the growing trend of direct involvement of the major broadcast networks have in retransmission consent negotiations between MVPDs and independent station affiliates? Do the demands of broadcast networks for a portion of stations' retransmission consent compensation and/or their threats to veto stations' agreements unless they include compensation that is satisfactory to the network make it more difficult for parties to reach agreement? In light of the fact that retransmission consent rights belong to stations, rather than networks, does a network's attempt to prevent or limit a station's grant of retransmission consent run afoul of any Commission rules or policies? What effect is such network involvement in retransmission consent negotiations having on consumers?
7. Should the Commission reform the current retransmission consent framework to expand the list of *per se* violations of the obligation to negotiate in good faith? For example, should the Commission determine that any of the following constitute bad faith *per se*: (1) giving a broadcast network veto power over an affiliated station's right to grant retransmission consent; (2) attempts to limit an MVPD's geographic distribution area for broadcast programming; (3) attempts to restrict MVPDs from importing out-of-market stations into areas where they are "significantly viewed"; (4) separately owned Big 4 broadcast stations in the same DMA jointly negotiating retransmission consent fees; (5) tying the carriage of a broadcast station electing retransmission consent to the carriage of affiliated cable programming channels; (6) price discrimination against MVPDs in the same market; and/or (7) refusing to permit transparency regarding the price paid for retransmission of a broadcast signal? What remedies should be available in the event the duty to negotiate in good faith is violated?
8. What role do the additional broadcast protections of network non-duplication and syndicated exclusivity (together with underlying contractual exclusivity) play in broadcaster threats to pull their signals as part of retransmission consent negotiations? Similarly, what role does the Copyright Act's "unserved household" restriction on the satellite retransmission of distant signals play in such threats? Should the Commission repeal or modify these exclusivity rules? Should the Commission adopt rules to affirmatively prohibit stations from entering into these kinds of exclusivity contracts moving forward? Should the Commission's good faith rules be expanded to restrict collusion between networks and their affiliates to impair an MVPD's ability to provide substitute programming for a local station in the event of a retransmission consent impasse? If the Commission changes its exclusivity rules, what parallel actions could it take with respect to satellite carriage, which are governed by separate

provisions of the Copyright Act? Could the Commission, for example, also require broadcast stations to waive the relevant provisions of the Copyright Act, or deem it a *per se* violation of good faith negotiation not to do so? The vast majority of broadcast stations cannot deliver a viewable off-air signal throughout their local markets. Should broadcast stations be permitted to negotiate exclusive rights for areas they cannot themselves serve? Should the Commission require as a precondition for negotiating exclusive rights that a station demonstrate its ability to serve its entire DMA?

9. To what extent are separately owned broadcast stations affiliated with “Big 4” networks (i.e. ABC, NBC, CBS, FOX) in the same market jointly negotiating retransmission consent agreements with MVPDs? To what extent, if any, are arrangements to jointly negotiate retransmission consent found in local marketing agreements, shared service agreements, management agreements, and other written arrangements? What effect, if any, do these arrangements have on the prices, terms and conditions paid by MVPDs compared with the prices, terms and conditions paid to broadcast stations that negotiate separately? What impact does this practice have on MVPD subscribers? Are joint negotiations among separately owned broadcast stations consistent with a competitive marketplace? Should the Commission restrict or prohibit such arrangements? Should the Commission’s ownership rules be amended to address situations in which an affiliate of a “Big 4” broadcast network obtains control of the retransmission consent rights of a second “Big 4” network affiliate in the same DMA by using a multicast streams to broadcast the programming of the second station?
10. To what extent, if any, do broadcasters extract higher retransmission consent fees and more onerous carriage terms and conditions from smaller MVPDs than larger ones who operate in the same market and carry the same broadcast signals? What cost-based justifications are there for charging smaller MVPDs higher fees than larger operators? How much of the difference in prices, terms and conditions paid by smaller MVPDs compared with larger ones is cost-based and how much is based on differences in bargaining power? What impact do higher retransmission consent fees have on smaller MVPDs, their customers and smaller MVPDs’ ability to deploy advanced services, including broadband?